

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-3025
76-1189

To be argued by
JAMES P. LAVIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1189

UNITED STATES OF AMERICA,

Appellee,

—v.—

VIRGIL ALESSI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA,

Appellee,

—v.—

VIRGIL ALESSI,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Virgil Alessi appeals from a pre-trial order entered April 6, 1976, in the United States District Court for the Southern District of New York by the Honorable Dudley B. Bonsal, United States District Judge, denying Alessi's motion for dismissal of the indictment.

On February 21, 1975, Indictment 75 Cr. 170 was filed in fourteen counts charging Anthony Manfredonia, Thomas Murray, Joseph Barone, Fiore Rizzo, Lawrence Iarossi, Graziano Rizzo, Leonard Rizzo, Renato Croce and Patsy Anatola with conspiracy to violate the federal narcotics laws as well as with numerous substantive narcotics offenses in violation of Title 21, United States Code, Sections 173, 174, 812, 841(a)(1), 841(b)(1)(A) and 846. Subsequent to their arrests on March 3, 1975, Manfredonia and Murray began cooperating with the Government. Manfredonia provided the names of

the suppliers of the vast quantities of heroin he had been distributing during 1968-1972, and agreed to testify against them as well as against his customers. As a result of his testimony before a Southern District Grand Jury, Indictment 75 Cr. 170 was superseded by Indictment 75 Cr. 772, filed on August 4, 1975. (App. 1-13; Tr. 375-486, 676-723)* Indictment 75 Cr. 772 substantially realleged the crimes contained in Indictment 75 Cr. 170, and added as defendants Manfredonia's heroin sources Virgil Alessi, Anthony Passero, John D'Amato, James Panebianco, and the additional customers Snider Blanchard, William Huff and Charles Brooks.** All of the defendants except Alessi were charged in Count One with conspiracy to violate the federal narcotics laws and with a total of twenty-one substantive narcotics violations. Although named as a co-conspirator but not a defendant in the conspiracy count, Alessi is charged in two substantive counts with aiding and abetting the receiving, concealment and transportation of one-quarter of a kilogram of heroin in or about November of 1970 (Count Five) and one-eighth of a kilogram of heroin in or about February of 1971 (Count Seven), in violation of Title 21, United States Code, Sections 173 and 174 and Title 18, United States Code, Section 2. Alessi is further charged in three additional substantive counts with aiding and abetting the distribution and possession with the intent to distribute of one-quarter of a kilogram of heroin in or about December of 1971 (Count Fifteen) and one-quarter of a kilogram of heroin in or about the summer of 1971 (Count Sixteen) and another

* "App.", "S. App." and Br. refer to appellant's appendix, supplemental appendix and brief. References in the form "Tr." is to the record before this Court in *United States v. Iarossi*, Dkt. No. 76-1132.

** Lawrence Iarossi, Graziano Rizzo, Leonard Rizzo, Joseph Barone, Fiore Rizzo, Renato Croce, defendants from the superseded indictment, were also renamed as defendants in Indictment 75 Cr. 772. Manfredonia and Murray were not reindicted since they had pled guilty to charges contained in Indictment 75 Cr. 170.

one-quarter of a kilogram of heroin in or about the summer of 1971 (Count Seventeen), all in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and Title 18, United States Code, Section 2.*

Trial on Indictment 75 Cr. 772 was scheduled to commence on January 20, 1976. Prior to trial Alessi moved to dismiss the charges against him, claiming that the indictment violated the terms of a plea bargain agreement he had reached with Federal Strike Force Attorney James O. Druker, in the Eastern District of New York in October, 1972, prior to Alessi's plea of guilty in that District to an information charging him with conspiracy to violate the federal narcotics laws in violation of Title 21, United States Code, Section 846. Alessi asserted that in return for his plea, Druker represented to him not only that he would receive a suspended sentence but also that he would not be prosecuted for any overt acts committed during the course of the Eastern District conspiracy which might constitute substantive violations of the narcotics laws.** Alessi further asserted that Druker's representation was binding upon the United States Attorney for the Southern District of New York and that the possession, transportation, concealment and distributions by Manfredonia, which Alessi is charged with aiding and abetting, were nothing more than overt acts in furtherance of the conspiracy charged in the Eastern District of New York. Alessi thus argued that the Southern District prosecution on

* The Government's Bill of Particulars, served on December 30, 1975, further informed Alessi that the person he was charged with aiding and abetting in each of these substantive counts was Anthony Manfredonia. (App. 14, 18-20).

** Alessi contended that Druker's promises related not simply to the conspiracy charged in the information to which he actually pleaded guilty (S. App. 7-8), but to an *even broader* conspiracy contained in an indictment dismissed as part of the plea bargain agreement. (App. 40-44)

those charges violated the terms of his earlier plea bargain and constituted a denial of due process. (App. 28)

By an endorsement decision dated December 29, 1975, Judge Bonsal reserved a final determination on Alessi's motion until the conclusion of the forthcoming trial, at which time an evidentiary hearing would be held. Alessi filed a notice of appeal, which the Government thereafter moved to dismiss. On January 19, 1976, this Court denied the Government's motion, treated Alessi's appeal as a petition for mandamus, and directed Judge Bonsal either to give Alessi a severance or to delay the trial to conduct a hearing and decide Alessi's motion. (App. 24-26) On January 19, 1976, Judge Bonsal granted Alessi a severance and on January 20, 1976, trial commenced on Indictment 75 Cr. 772 against seven defendants.* On February 4, 1976, the jury found all seven defendants guilty on all counts. (App. 38) On February 11, 1976, Alessi and the Government agreed to dispense with a further evidentiary hearing and proceed with the record as it then existed with respect to Alessi's motion. (App. 30-31; S. App. 134) Thereafter, on April 6, 1976, Judge Bonsal filed a memorandum opinion denying Alessi's due process motion on the grounds that the conspiracy charged in the original indictment in the Eastern District of New York and the conspiracy charged in Indictment 75 Cr. 772, in the Southern District of New York were separate and distinct and, furthermore, that Druker's representation did not bind the prosecutor in the Southern District. (App. 27-38) Alessi filed a notice of appeal on April 13, 1976 and on April 15, 1976, Judge Bonsal scheduled trial for May 4, 1976, which date was communicated to Alessi's attorney on the 16th or 19th of April, 1976. After un-

* These were Iarosso, Panebianco, Leonard Rizzo, Croce, Blanchard, Brooks and Anatala. Passero was a fugitive and Graziano Rizzo, John D'Amato and Barone pled guilty prior to trial. Huff and Fiore Rizzo were also severed.

successfully attempting to obtain a week's adjournment because of other business, Alessi's attorney agreed to proceed to trial on May 4, 1976. Approximately one week prior to the scheduled trial date, on April 26, 1976, Alessi's attorney announced her intention to pursue the appeal and the present petition for a writ of mandamus was filed on April 29, 1976.

On May 3, 1976, this Court ordered the trial stayed pending a determination of Alessi's petition and on May 6, 1976, a writ of mandamus issued directing that the trial be stayed pending a determination of this appeal.

Statement of Facts

The Eastern District Proceedings in 1972

On January 24, 1972, Indictment 72 Cr. 88 was filed in the Eastern District of New York charging Virgil Alessi, Vincent Papa, Anthony Passero and others with conspiracy to violate the federal narcotics laws (hereinafter referred to as the "Paradiso Indictment", S. App. 1-4).^{*} On April 17, 1972, a second one-count indictment 72 Cr. 433 was filed again charging the defendant Alessi, and Vincent Papa, Rocco Evangelista and Danny Ranieri with conspiring to violate the federal narcotics laws (hereinafter referred to as the "Garland Indictment", (S. App. 5-6)).^{**} The Paradiso and Garland indictments were consolidated into Indictment 72 Cr. 473 (hereinafter referred to as the "Consolidated Indictment"), which contained an additional count charging Alessi, Vincent Papa, Anthony Passero, Anthony Loria, Sr., and Frank Di-

^{*} The indictment was obtained on the basis of the Grand Jury testimony of Angelo Paradiso. (App. 31)

^{**} This indictment was obtained as a result of the Grand Jury testimony of Stanton Garland. (App. 31)

Amatto (sic) with being engaged in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848. (App. 40-44; S. App. 73-77)

In March, 1972, the attorneys for Vincent Papa approached the prosecutor in charge of the cases, Eastern District Strike Force attorney James Druker, to begin plea negotiations on behalf of Papa and Papa's co-defendants.* (S. App. 32) Papa, through his counsel, agreed to plead guilty to the conspiracy count of the Consolidated Indictment and also to one count of a four-count-tax-evasion information. Druker in return agreed to recommend that Papa be sentenced to five years imprisonment on the conspiracy count and a concurrent term, if any, on the tax case. In addition, Druker, as part of the package, agreed to dismiss the charges against Evangelista, Ranieri, D'Amato and Passero if they surrendered for fingerprinting. Druker also agreed to let Alessi plead guilty with a recommendation to the Court that Alessi receive a suspended sentence. Papa pleaded guilty on September 5, 1972, to the conspiracy count in the Consolidated Indictment and one count of the tax information; he was later sentenced to concurrent five-year terms of imprisonment. (S. App. 40-45)

On October 2, 1972, Alessi pleaded guilty to a one-count information charging him, Sally Ann Paiollia, Joseph Cesario and Henry Uvino with conspiracy to violate the federal narcotics laws in violation of Title 21, United States Code, Section 846.** (S. App. 43-44)

* Papa's attorneys during the negotiations were Gino Gallina, Frank A. Lopez, Harold Fahringer, Theodore Rosenberg and Wallace Musoff. Mr. Gallina also represented Alessi.

** Ike Williams, Edgar Leonard, Jacqueline Gardner, Anthony Loria, Sr., William Huff, Anthony Loria, Jr., Ralph Loria and others were named as unindicted co-conspirators in the information. (S. App. 7).

Alessi was sentenced on the same day to the five-year-suspended sentence recommended to the Court by Druker. (S. App. 43-44) The outstanding Paradiso, Garland and Consolidated Indictments were then dismissed as against Alessi on motion of the Government. (S. App. 9-39)

The Southern District Indictment of Vincent Papa

Indictment 74 Cr. 1082, filed in the Southern District on November 18, 1974, charged Vincent Papa and five others with violations of the federal narcotics laws. Count One charged Papa and the others with engaging in a narcotics conspiracy in violation of Title 21, United States Code, Sections 173, 174 and 846. Count Two charged Papa and Stanzone with the substantive offense of possessing with the intent to distribute one hundred and sixty pounds of heroin.

On February 9, 1975, after a trial before the Honorable Charles L. Brieant, Jr., and a jury, Papa was convicted on both counts and on May 14, 1975, he was sentenced to concurrent terms of imprisonment of 20 years on Count One and 15 years on Count Two.

Prior to the trial Papa claimed that the Southern District indictment placed him in jeopardy since the conspiracy charged in the Southern District indictment was the same as the conspiracy count to which he had pled guilty in the Eastern District of New York in 1972. Papa further argued that the terms of the plea negotiations between his attorneys and Eastern District Strike Force attorney James Druker in 1972 in connection with his plea of guilty to the Consolidated Indictment barred his prosecution in the Southern District.

On January 16, 1975, an evidentiary hearing was held before Judge Brieant in which Papa called two

witnesses. They were Wallace Musoff, one of Papa's attorneys during the Eastern District negotiations in 1972, and James Druker, the Eastern District Strike Force prosecutor. (S. App. 46-121)

Druker testified in pertinent part that:

I advised Mr. Papa's lawyers that he was covered as far as this conspiracy went. I told him that the state of the law afforded him this; that if it should subsequently turn up next month or next year that a witness came to us with evidence against Mr. Papa on another piece of this same conspiracy that he was covered on that. I further made clear to them that should a witness pop up who gave us evidence of unrelated criminal activities on Mr. Papa's part, even though it was during the same period of the conspiracy, that he was not covered on that.

Q. [Papa's attorney] Now, you used the word "covered" here. Is that the word you used then, if you can recall? A. [Druker] No. What I would have said then is that he is covered on this conspiracy and he won't be indicted [or] reindicted or rearrested for any piece of this conspiracy. I think I went into a little more elaboration. I advised, for example, that if somewhere down the chain of the ladder it turned out that Mr. Loria had been selling heroin to five or six people who were not named in my conspiracy but that it developed or became clear that this was as a result of the same chain from Mr. Papa on up, that he would be covered on this. Anything to do with that conspiracy.

Q. That conspiracy or crimes going out of that conspiracy were covered. A. That conspiracy or any of the overt acts contained in that conspiracy.

* * * * *

The Court: Did you qualify or modify or explain that word "unrelated" in any way?

A. [Druker]: I gave them a hypothetical which, if I recall, was that if a witness popped up and it were a witness that was part of this same conspiracy and he told us about Mr. Papa being involved in hijacking activities during that same period of time, even though there may be some of the same cast of characters involved, that he would not be covered on that.

The Court: Did you have a suspicion at that time that he [Papa] had been involved in hijacking activities?

[Druker]: No, but I used the phrase to them. I said I didn't want to give him a carte blanche for everything that he may have done in the past. I said he is covered on this conspiracy and that's it. I do remember using the term "carte blanche" and telling them that he was not going to be covered on everything that he had done during that period of time or prior.

* * * * *

The Court: What was the basis for using a reference to hijacking. Did you connect Mr. Papa in some manner with hijacking?

[Druker]: No. I just tried to pick something—it was just the first non-narcotic crime that entered my mind. It could have been bank robbery or something else. Hijacking just happened to hit me at the moment.

Q. [Papa's counsel]: So with regard to or in consideration for Mr. Papa's plea to Count 1 of the consolidated indictment, Mr. Druker, he was promised then that he would not be prosecuted for further aspects of that conspiracy, would that be a fair statement. A. Yes.

Q. Even if they were to form substantive counts?

* * * * *

A. I told them what I just testified to and I also told them that—I said “I am giving them what the laws affords him.” I said he can’t be indicted again on the same conspiracy. Beyond that and the one or two hypotheticals that I mentioned I didn’t elaborate any further, nor did they.

Q. Was there any discussion about the possibility of a substantive count involving transactions relating to the conspiracy to which he had pleaded?

A. There may have been. I have no specific recollection of any.

The Court: What is your basis for saying there may have been?

[Druker]: Simply that I can’t say a hundred per cent that there wasn’t. I don’t recall it at all. I have absolutely no recollection of it. I know that something was mentioned about overt acts from our conspiracy that he was covered as far as those were concerned.

Q. As far as substantive counts? A. Well the terms we used were overt acts.

* * * * *

A. I remember I said we are not going to pluck out an overt act out of this conspiracy and then turn around and reindict him on it.

Q. So that Mr. Papa was promised as well, then, in return for his plea, overt acts in furtherance of this conspiracy would not give rise to subsequent individual prosecutions. A. That’s correct. (S. App. 82-87)

During those negotiations Druker was questioned regarding an approximate \$1,000,000 seized from Papa in the Southern District of New York in 1972. Druker responded that "it is in the Southern District's bailiwick and I don't know what, if anything, they are going to do with it". Druker was never asked by Papa's attorneys to check with the Southern District concerning pending investigations in that District. (S. App. 107-108)

Judge Brieant reserved decision until the conclusion of the trial at which time he denied Papa's motion. In a 58-page memorandum opinion, he held, *inter alia*, that the conspiracies charged in the Eastern District and Southern District Indictments were separate and distinct, and further that Druker's representations to Papa did not bind the prosecutor in the Southern District. *United States v. Papa*, 74 Cr. 1082 (S.D.N.Y., April 4, 1975).

The Evidence Submitted on Alessi's Due Process Claim

Neither Alessi or the Government called witnesses with respect to Alessi's claim that the present prosecution deprives him of due process. Both relied for the most part on Druker's testimony before Judge Brieant. (S. App. 134-135) In addition, Judge Bonsal was furnished with copies of Alessi's plea and sentence before Judge Travia in the Eastern District on October 2, 1972 (S. App. 9-39); the Eastern District Indictments and Information (App. 40-44; S. App. 1-8); and the minutes of a hearing held before Judge Judd in the Eastern District on October 17, 1975, in a related Alessi matter. Druker also submitted an affidavit in which he stated, *inter alia*, that he did not intend to bar a Southern District prosecution by his representations to Alessi or to Papa and that he was unaware of the existence of An-

thony Manfredonia until he was so informed in 1975 by the Assistant United States Attorney in charge of Alessi's prosecution in the Southern District. (S. App. 44-45) Judge Bonsal also had, of course, the trial testimony of Manfredonia and others who were witnesses for the Government in *United States v. Iarossi*, the trial from which the case against Alessi was served. (App. 30-31).

ARGUMENT

POINT I

The appeal should be dismissed because the order appealed from was not a "final decision" within the meaning of 28 U.S.C. § 1291(a).

This appeal is brought pursuant to Title 28, United States Code, Section 1291(a), which confers on this Court jurisdiction only of appeals from "final decisions of the district courts of the United States. . . ." Even assuming that Alessi's due process claim still retains vitality in view of the recent decision of this Court in *United States v. Papa, supra*, the non-final nature of that claim does not vest this Court with jurisdiction to consider a pre-trial appeal on the merits.*

* On May 26, 1976, this Court issued an opinion in *United States v. Alessi*, Dkt. No. 76-1044, in which similar issues of appellate jurisdiction were presented and decided adversely to the Government. At the time of the filing of this brief, we have been informed that the United States Attorney for the Eastern District of New York will seek rehearing of that portion of the *Alessi* decision. In the event that that effort, which we fervently join, is made, this portion of the present brief is intended to preserve this important issue for possible reconsideration. In addition, for the reasons stated later in this brief, we believe this appeal presents particularly important considerations—perhaps distinguishing this appeal from the earlier *Alessi* appeal—that particularly demonstrate the inappropriateness of an interlocutory appeal.

This Court has repeatedly and unequivocally held that an order denying a motion to dismiss an indictment—even if based on a constitutional claim—is not appealable. *United States v. Garber*, 413 F.2d 284, 285 (2d Cir. 1969); *United States v. Foster*, 278 F.2d 567, 568-69 (2d Cir.), cert. denied, 364 U.S. 834 (1960); *United States v. Golden*, 239 F.2d 877, 878-79 (2d Cir. 1956); see also, *United States ex rel. Rosenberg v. United States District Court*, 460 F.2d 1233 (3d Cir. 1972). Such orders do not constitute a "final decision" in a criminal case from which an appeal may be taken. See *Parr v. United States*, 351 U.S. 513 (1956); *Berman v. United States*, 302 U.S. 211 (1937); see also *DiBella v. United States*, 369 U.S. 121 (1962); *Cobbledick v. United States*, 309 U.S. 323 (1940); *Cogen v. United States*, 278 U.S. 221 (1929); *Heike v. United States*, 217 U.S. 423 (1910).

In the recent decision of *United States v. Beckerman*, 516 F.2d 905, 906-907 (2d Cir. 1975), this Court found jurisdiction to entertain on appeal, prior to retrial, the question whether that retrial would subject the defendant to double jeopardy. In that case, the defendant had been tried once, the case was submitted to the jury, and the jury was eventually discharged after reporting a deadlock. The Government submits, however, that that holding should be limited to its facts, that is, the situation where the defendant has been put to the vexation and expense of one trial and will have to go through it all over again if his appeal is not heard prior to the retrial,* and further where the entire record necessary to determine the appellate issue is presented to this Court.

* This Court noted in *Beckerman* that the right not to be twice placed in jeopardy "will be invaded if an accused . . . is called upon to suffer to pain of two trials." 516 F.2d at 906 (emphasis added).

Alessi pled guilty to a narrowly defined conspiracy charge in the Eastern District. He has not been indicted in the Southern District for conspiracy, but rather for five substantive crimes involving aiding and abetting Anthony Manfredonia in the distribution, possession, transportation and concealment of large amounts of heroin in the Southern District of New York. Since Alessi had never been convicted, acquitted, or even charged with these crimes prior to his indictment in the Southern District of New York, Alessi has no claim of double jeopardy.

Clearly, then, any claim which Alessi has flows not from the double jeopardy clause, but from his assertion that his rights to due process have been violated by breaches of promises made to him by James Drucker. However, even if there were some arguable merit to this claim—and we submit that there is absolutely none—Alessi is not entitled to an immediate appeal from denial of his pre-trial motion even with an expansive interpretation of *Beckerman*.

Prior to *Beckerman, supra*, it has been established at least since *Rankin v. The State*, 78 U.S. (11 Wall.) 380 (1870), that the fact that a petitioner raises an issue of double jeopardy creates no exception to the rule that only final judgments are a predicate for appeal. In *Rankin*, the Supreme Court refused to hear petitioner's double jeopardy claim even though he was about to be tried in a State tribunal for offenses of which he had allegedly been earlier acquitted. Similarly, in *Heike v. United States*, 217 U.S. 423, 433 (1910), the Supreme Court held:

"It may thus be seen that a plea of former conviction under the constitutional provision that no person shall be twice put in jeopardy for the same offense does not have the effect to prevent

a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecution, and this notwithstanding the person is in jeopardy a second time if after one conviction or acquittal the jury is empanelled to try him again.*

In *Heicke*, the defendant claimed that he was about to be tried for offenses as to which the Government had earlier granted him complete immunity. Nonetheless, the Court held that appeal must await the outcome of the trial and the entry of judgment.**

* Alessi claims in his brief, at page 10, that *Heicke* is inapplicable to this case since there the Court construed the immunity statute as "permitting prosecution but providing a defense on the merits of the charge." This reading of *Heicke* is not only refuted by the reliance in that decision on the earlier decision in *Rankin*, *supra*, and subsequent reliance on *Heicke* in *Parr v. United States*, *supra*, but also on the conclusion in the final paragraph of the *Heicke* opinion that "a plea of former conviction under the constitutional provision that no person shall be twice put in jeopardy for the same offense does not have the effect to prevent a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecution, and this notwithstanding the person is in jeopardy a second time if after one conviction or acquittal the jury is empanelled to try him again."

** It is true that the statute under which appeal was taken in *Heicke*, 26 Stat. 825, c. 517, § 5 (March 3, 1871), did not use the term "final decision." However, the Court noted that prior decisions of the Supreme Court had restricted appeals to "cases in which there had been a final judgment," *id.* at 428, and found it to be the "settled practice of this court that a case . . . is only to be reviewed here after final judgment." *Id.* at 429. As a consequence, in subsequent cases involving § 1291 in its present form the Supreme Court has viewed *Heicke* as requiring a "final decision" as a jurisdictional prerequisite for appeal. See, e.g., *Corey v. United States*, 375 U.S. 169, 174 (1963); *Parr v. United States*, 351 U.S. 513, 517 (1956); *Radio Station WOW v. Johnson*, 326 U.S. 120, 123-24 (1945).

Not only are the *Heicke* and *Rankin* decisions still valid,* but the Supreme Court has more recently indirectly affirmed that double jeopardy claims do not dispense with the requirement of a "final decision." In *Carroll v. United States*, 354 U.S. 394, 403 (1957), the Court noted that *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), a civil case relied on by this Court in *Beckerman* and by Alessi in his brief, did recognize a "small class" of non-final decisions from which immediate appeal might be taken. However, the Court said:

"The instances [of interlocutory appeal] in criminal cases are very few. The only decision of this Court applying to a criminal case the reasoning of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, held that an order relating to the amount of bail to be exacted falls into this category. *Stack v. Boyle*, 342 U.S. 1."

In view of this rather clear line of Supreme Court authority, it is not surprising that this Court prior to *Beckerman* refused to allow interlocutory appeals on double jeopardy issues. *United States v. Ford*, 237 F.2d 57, 67 (2d Cir. 1956), *vacated as moot*, 355 U.S. 38 (1957). In *Ford*, the trial court first directed a verdict of acquittal as to a count of the indictment on which the trial jury had deadlocked, then vacated the verdict on acquittal. The defendant argued on appeal that retrial on that count would subject him to double jeopardy. This Court held:

* Neither *Heicke* nor *Rankin* was cited or discussed by this Court in *Beckerman* or in the very recent decision in *United States v. Alessi*, Dkt. No. 76-1044 (May 26, 1976). Since those decisions are clearly inconsistent with *Beckerman*, and have been reaffirmed rather than overruled by the Supreme Court, we submit that they undermine the validity of the *Beckerman* decision, and certainly provide no basis to extend *Beckerman* to apply to this case.

"Since the order [vacating the directed verdict of acquittal] is interlocutory and the defendant has not yet been placed in jeopardy thereunder, the issue is not currently appealable and the pending appeal as to Count 1 must accordingly be dismissed."

It is true that *Ford* was later vacated as moot by order of the Supreme Court, as a result of defendant's death on October 6, 1957. However, while the decision would concededly be ineffective for purposes of *res judicata* or collateral estoppel, *United States v. Munsingwear*, 340 U.S. 36 (1950), the Government submits that since the event causing the mootness occurred nine days after this Court rendered its opinion, the considered judgment of this Court in the controversy then before it retains its full precedential value on the issue of law decided.

In *Gilmore v. United States*, 264 F.2d 44, 46-47 (5th Cir.), *cert. denied*, 359 U.S. 994 (1959), cited with approval by this Court in *United States v. Kaufman*, 311 F.2d 695, 699 (2d Cir. 1963), the Fifth Circuit eloquently set forth the reasons for not permitting interlocutory appeals on double jeopardy claims:

"But even if it were assumed that the second trial was forbidden as double jeopardy, that does not invest us with jurisdiction to vindicate such right. The Constitution does not guarantee an appeal. That comes wholly from the statute. There are many instances in which it is ultimately determined that constitutional rights have been violated. But the nature of the asserted right, i.e., a constitutional one, does not distinguish appellate review of any such question from the assertion of other rights, whether statutory or common law, or from a procedural rule. At least so long as a criminal case is pending, review of such matters, as for ex-

ample, unlawful search and seizure, unlawful arrest, unlawful detention, unlawful indictment, unlawful confession, must await the trial and its outcome. This so even though, at the end of that trial, or an appeal from the judgment of conviction, it is ultimately determined that the violation of the constitutional right compels an acquittal. When that is the outcome, the individual accused may claim in a very real sense to have been subjected to a trial that ought never to have taken place. Congress might, as it has recently done in a very limited way for civil matters, 28 U.S.C.A. § 1292(b), provide for interlocutory appeals to test such questions prior to trial and a final judgment in the traditional sense. Until Congress does so, the individual affected is witness to the fact that, 'Bearing the discomfiture and the cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.' *Cobbledick v. United States*, 1940, 309 U.S. 323, 325, 60 S. Ct. 540, 541, 84 L. Ed. 783.

The Constitutional right or the asserted violation of it, does not bridge the gap of appellate statutory jurisdiction. Nor, for like reasons, does it, through some reverse process, expand the term 'final decision' into something which, contrary to a long-settled Congressional policy, amounts in actuality to piecemeal review.

Accord, *United States v. Bailey*, 512 F.2d 833 (5th Cir. 1975), cert. dismissed, — U.S. — (1976). But see *United States v. Lansdown*, 460 F.2d 164, 170-72 (4th Cir. 1972); *United States v. DiSilvio*, 520 F.2d 247 (3d Cir. 1975), cert. denied, — U.S. — (1976). However, even the decision in *Lansdown* permitted interlocutory

appeal only in a situation where denial would have subjected defendant to "the embarrassment, expense, anxiety and insecurity involved in the *second* trial." 460 F.2d at 171 (emphasis supplied), and in *DeSilvio* the petitioner had already been tried once.

Furthermore, even assuming the validity of the *Beckerman* opinion—although the Government submits that *Beckerman* should be re-examined in the light of *Heicke* and *Rankin*, which were not considered in that opinion—powerful considerations of experience and policy mitigate against extension of *Beckerman*. Allowance of an appeal in this case could only lead to encouragement of piecemeal review of issues arising in complex, multi-defendant cases. Reliance by Alessi on the Supreme Court's decision in *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949), and the factors cited in that civil proceeding, Brief at 5-7, only serve to illustrate the variety of issues ingenious counsel will attempt to bring before this Court in advance of trial. Virtually any legal issue may, in certain postures, be determinative of whether or not the defendant will be subjected to a trial. For example, a defect in the indictment or irregularities in the composition of a grand jury will vitiate, *ab initio*, a trial, and a defendant clearly has a right not to be tried in such circumstances. However, this Court has explicitly held that the denial of motions based on such claims cannot be appealed prior to trial. *United States v. Garber*, *supra*. Similarly, a valid claim of immunity would, as a matter of logic, determine whether a trial should be had; the Supreme Court, as noted, has held in *Heicke* that such a claim cannot only be raised on appeal after trial. Further situations where Fourth or Fifth Amendment claims will similarly be entirely determinative of whether a trial will take place at all simply await the proper factual situation and the ingenuity of counsel.

Finally, the nature of the substantive claims advanced by Alessi in this appeal dramatically illustrate the wisdom of preserving appealable issues until after a trial. In both Point II * and in Point III ** of his brief Alessi makes factual assertions about what the Government "alleges" or "contends." *** In large part, these assertions are simply false, as the Government intends to show at trial. Thus, Alessi is essentially asking this Court to decide an important—indeed, determinative—issue on the basis of asserted or hypothetical facts, when the true facts (that is, the proof to be adduced on this indictment) will not be completely known until trial.**** This procedure, we submit, is simply an invitation to multiple and inconclusive appeals that finds no basis in precedent or logic. Indeed, as will appear later in this brief, certain of Alessi's improper assumptions concerning the Government's prospective proof go to the core of his theory on appeal. By seeking review of the issue prior to the completion of a proper record, Alessi has

* At pages 17-18 of his brief, Alessi states that the Government "alleges" that Alessi had no knowledge of narcotics sold to others in the Southern District by Manfredonia.

** At page 28, Alessi states that "the Government does not contend that appellant actually know of Manfredonia's subsequent transfers."

*** In addition, counsel for Alessi sees fit to include as part of the argument to this Court conversations with an Assistant United States Attorney that finds no place in the record on appeal, and other events that post-date the decision appealed from. See, e.g., Brief at 20. Clearly, Alessi not only wishes to fragment review of the case against him, but to keep up a constant barrage of data to this Court which he claims bear on the substantive issues. The proper course, we submit, is to wait until *all* of the evidence necessary to determine the issues, including the evidence adduced at trial, have been presented to the District Court, and *then* allow an appeal from the conviction.

**** In particular, Alessi simply cannot assume that the evidence against him will be identical to the evidence adduced in January, 1976, against his co-defendants.

simply deprived this Court of the means to decide his claims. The Supreme Court has noted that double jeopardy claims "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970), quoting from *Sealfon v. United States*, 332 U.S. 575, 579 (1948). In *Beckerman* "all the circumstances" were contained in the record, since the only issue was the propriety of the mistrial granted by the District Court. Here, however, much of Alessi's arguments are based upon predictions of what the Government will prove. This is not only an invitation to an advisory opinion based on hypothetical facts, but opens the door to a further appeal on the same issue if different facts are actually presented at trial.

The arguments adduced by Alessi in this appeal presage a substantial step toward piecemeal review. The Government submits that the impressive authority against interlocutory appeal, both to determine constitutional claims in general and double jeopardy claims in specific, requires that such appeals be permitted only where the defendant has actually experienced the rigors of one trial and seeks to avoid a second trial, and that to the extent that *Beckerman* retains validity at all, it should be limited to its facts. This Court in *Beckerman* was "obviously and properly influenced by the fact that the first trial had proceeded to verdict." *Illinois v. Somerville*, 410 U.S. 458, 467 (1973). Accord, *United States v. Gentile*, 525 F.2d 252, 256 n.2 (2d Cir. 1975). That consideration, given weight in *Somerville* and *Gentile*, is absent in the instant case and that, together with the fact that in *Beckerman*, but not in this case, all the facts were presented to the Court, effectively distinguishes it from *Beckerman*.

Accordingly, the appeal should be dismissed.

POINT II

Alessi's denial of due process claim has been foreclosed by this Court's decision in *United States v. Papa*, Dkt. No. 75-1208 (2d Cir. April 2, 1976).

On January 19, 1976, when Alessi moved to have his trial severed from that of two of his co-defendants, he suggested to Judge Bonsal that the Court of Appeals might, in the interim, hand down its decision in the then-pending appeal in *United States v. Papa* which would be "dispositive of this whole kettle of fish." (S. App. 124-125) Alessi obtained the severance. This Court by its opinion in *United States v. Papa*, 75-1208 (2d Cir. April 2, 1976), slip op. 2977, has subsequently disposed of Alessi's denial of due process claim, by holding, with respect to the 1972 Eastern District plea bargain entered into by Papa and Alessi, that:

The representations made by Druker related expressly and by necessary implication exclusively to Eastern District investigations and prosecutions. The terms of the bargain did not extend to matters under investigation elsewhere. Papa's attorneys' principal concern was to ensure that their client would not be re-indicted on "pieces" of the Eastern District conspiracy. Druker promised that the bargain immunized Papa from any further prosecution on basis of any future information he received related to the Eastern District conspiracy. Papa's attorneys secured a promise from Druker that there would be no additional prosecution stemming from matters presently under investigation in the Eastern District. Druker specifically refused to grant appellant "*carte blanche*" immunity as to all his past criminal conduct, and carefully noted that Papa was still

subject to prosecution on any unrelated criminal activity. Never once was Druker asked to inquire about investigations in the Southern District nor was he asked included Southern District crimes in the plea negotiations. Indeed, when Druker was queried by Papa's attorneys as to the money seized from Papa in February, 1972, he responded: "It's in the Southern District's bailwick and I don't know what if anything they are going to do with it."

Slip op. at 2995-2996.

Alessi, obviously aware of the devastation the *Papa* decision has wrought to his due process claim, attempts to salvage some remnant of the wreckage by asserting that he was indicted in the Southern District solely to circumvent and renege on the promises made to him by Druker in the Eastern District in 1972. (Br. 18, 28, 30) The argument is utterly contrived, and has no basis in fact.

The United States Attorney's office in the Southern District, in drafting the charges contained in the present indictment against those whom its witness Anthony Manfredonia had identified as his heroin sources, was, of course, aware of Alessi's previous plea to a narcotics conspiracy, and, to forestall any possible double jeopardy claim on Alessi's part, decided not to include him in the conspiracy count as a defendant, but only in substantive counts.* Since Alessi is not charged in the conspiracy count here he has no valid double jeopardy claim. It is

* Anthony Passero who also was a party to the same plea bargain negotiations with Druker was included in the conspiracy count, since the charges against him in the Eastern District were dismissed without any plea.

thus immaterial whether the Eastern District and Southern District conspiracies are separate and distinct, as the District Court held in this case (App. 36), or in fact the same, and Alessi's lengthy argument concerning the claimed identity of the two conspiracies is beside the point.

It follows that in the absence of any governmental promises of non-prosecution there would be no restrictions whatsoever, on any district including the Eastern, in indicting Alessi for substantive counts. *United States v. Mallah*, 503 F.2d 971, 987 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States v. Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. Zane*, 495 F.2d 683, 692 (2d Cir.), *cert. denied*, 417 U.S. 903 (1974); *United States v. Cioffi*, 487 F.2d 492, 496-498 (2d Cir. 1973), *cert. denied, sub nom. Ciczio v. United States*, 416 U.S. 995 (1974). Since this Court has held in *Papa* that the promises made in the Eastern District were binding only in that District, it further follows that the United States Attorney in the Southern District of New York is in no way precluded from prosecuting Alessi in the present indictment.

Perhaps realizing the force of this, Alessi would have this Court believe that the decision to indict Alessi as an aider and abettor of Manfredonia's acts in the Southern District is a perversion of the law contrived solely to renege on Druker's promise to Alessi. This claim distorts both the facts and the law. In particular, the facts surrounding Alessi's indictment in this District illustrate the hollowness of the allegations.

As set forth in the statement of facts, *supra*, and as the District Court found in his opinion, the principal witness against Alessi in the Southern District, Anthony Manfredonia, was originally indicted in this district along with numerous others for conspiring to distribute and

distributing large amounts of heroin to customers in New York City, Pittsburgh, and Baltimore. Manfredonia decided to cooperate and began doing so in May 1975, at which time he informed prosecutors in the Southern District that his principal source of heroin was Alessi and his partners. His testimony enabled a Southern District Grand Jury to return the present indictment against those sources and others, some of whom were already named as defendants in a pending Southern District case. No witness or evidence used in the obtaining of this indictment was obtained from prosecutors in the Eastern District. In fact, Druker had never heard of Manfredonia until he was so informed by a Southern District Assistant United States Attorney in 1975. (S. App. 40, 45). That the present indictment was obtained as a result of an independent investigation is beyond question, and indeed is not disputed by Alessi in any but the most conclusory manner.

In *United States v. Papa, supra*, the principal witness against Papa was Joseph Ragusa. Ragusa had cooperated with the prosecutor during the time of the plea bargain negotiations with Papa and Alessi in the Eastern District and had, unknown to Druker, testified before a Grand Jury in that district against Papa in July of 1972. Druker, however, became aware of Ragusa's existence and of his testimony prior to Papa's formally entering a plea on September 5, 1972, although Druker did not at that time reveal these facts to Papa.

In rejecting Papa's claim that Ragusa's subsequent Grand Jury and trial testimony against Papa in the Southern District was barred by the plea bargain representations, this Court stated:

Although the Ragusa matter did not relate to a "piece" of the Eastern District conspiracy, it did concern a matter under investigation in the East-

ern District at the time the plea was entered. As such, the Court below found the Ragusa matter could not, consistent with *Santobello, supra*, have formed the basis of a prosecution of Papa in the Eastern District, a point we need not reconsider. The Southern District prosecution, however, stemmed from investigations conducted which were entirely independent of this testimony, and which discovered the existence of Ragusa as a witness from entirely different sources. There is no link between the Ragusa testimony known to Druker and the Southern District investigation which commenced two years later. With no such link and promises limited to Druker's "bailiwick," it cannot be said that the prosecution below was in contravention of the Eastern District plea bargain.

United States v. Papa, supra, slip op. at 2996

Clearly, if the prosecutor in the Southern District in *Papa* was not prohibited by Druker's representations from using Ragusa as a witness when Ragusa had been a Eastern District Grand Jury witness against Papa during the very plea bargaining which gave rise to the claimed representations, this District cannot be proscribed from using Manfredonia, whose existence was unknown to anyone in the Eastern District and who did not begin to cooperate with the Southern District until 1975, when he was unearthed through a totally independent investigation. *United States v. Papa, supra*, slip op. at 2996.

At trial in this case, the Government will show that Alessi, along with Papa, was responsible for distributing and causing others to distribute vast quantities of heroin to Pittsburgh and Baltimore as well as New York. The evidence will also reveal, contrary to Alessi's claims, that Alessi was well aware that it was being transported to and concealed, possessed and distributed to others in the Southern District of New York (Tr. 385-486)

Thus, despite Alessi's attempts to impute sinister motives to the Southern District, he was properly indicted as an aider and abettor of those acts. *United States v. Buckhanon*, 505 F.2d 1079, 1083 (8th Cir. 1974); *United States v. Bommarito*, 524 F.2d 140, 145 (2d Cir. 1975); *United States v. Chestnut*, 399 F. Supp. 1292, 1295-1297 (S.D.N.Y. 1975); *aff'd* — F.2d — (2d Cir. 1976); *United States v. Kilpatrick*, 458 F.2d 864, 867-868 (7th Cir. 1972); *United States v. Jackson*, 482 F.2d 1167, 1178-1179 (10th Cir. 1973), *cert. denied*, 414 U.S. 1159 (1974).

Indeed, the prospective facts in this case virtually parallel those in *United States v. Bommarito, supra*. In that case, Bommarito transferred narcotics to one Louis Ciraco in Florida and, while Bommarito never set foot in New York, Ciraco took the drugs to the Southern District of New York and sold them. This Court held that the evidence sufficed to support Bommarito's conviction in the Southern District on *both* the conspiracy and the substantive counts. It follows that Alessi's indictment in the Southern District is entirely proper, and is in no way affected by prior promises made to him in the Eastern District that were, as this Court has held, limited to that District.

POINT III

Conspiracy to commit a crime and aiding and abetting the actual commission of that crime are separate and distinct offenses.

Alessi claims he is twice being put in jeopardy because the aiding and abetting charges in this district are identical to the conspiracy he had pleaded to in the Eastern District. The argument is frivolous.

First, all Alessi's statements as to what the Government contends with respect to his knowledge and what it

will prove are remarkable inasmuch as he has never heard the evidence against him. Alessi clearly cannot—and should not—assume that the evidence against him will be identical to the evidence against his co-defendants. The Government, to the contrary, will prove that Alessi knew some of Manfredonia's customers and that he had a continuing, active stake in the outcome of Manfredonia's possessions, and sales. It thus follows that the proof against Alessi will be sufficient to convict him as an aider and abettor. *United States v. Bommarito, supra.*

Second, it is well established law that aiding and abetting is a crime separate and distinct from conspiracy. *Nye & Nessen v. United States*, 336 U.S. 613 (1949); *Pereira v. United States*, 347 U.S. 1, 11-12 (1954); *United States v. Tropicano*, 418 F.2d 1069, 1083 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *United States v. Peterson*, 524 F.2d 167, 172 (4th Cir. 1975), *cert. denied*, — U.S. — (1976); *United States v. Townes*, 512 F.2d 1057 (6th Cir.), *cert. denied*, 423 U.S. 847 (1975); *United States v. Tierney*, 424 F.2d 643, 645-646 (9th Cir.), *cert. denied*, 400 U.S. 850 (1970). Alessi's claim is totally frivolous.

CONCLUSION

The appeal should be dismissed. In the alternative, the order of the District Court should be affirmed.

Respectfully submitted,

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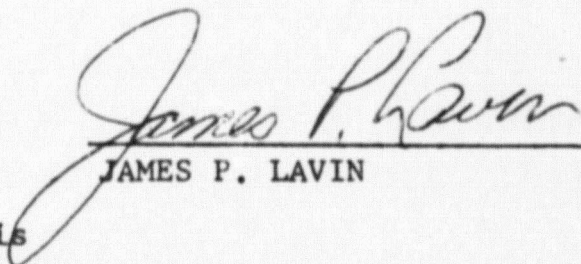
State of New York)
County of New York)

JAMES P. LAVIN being duly sworn
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

Stating also that on the 1st day of June, 1976
he served two (2) copies of the within
Brief for the United States of America
by placing the same in a properly postpaid franked envelope
addressed:

Nancy Rosner
401 Broadway
New York, N. Y. 10013

And deponent further says that he sealed the said envelope
and placed the same in the mailbox for mailing at the
United States Courthouse Annex, One St. Andrew's Plaza,
Foley Square, Borough of Manhattan, City of New York.


JAMES P. LAVIN

Sworn to before me this

1st day of June, 1976



RONALD L. GARNETT
Notary Public, State of New York
No. 31-4512144

Qualified in New York County
Commission Expires March 30, 1977